

**EXHIBIT B**  
**NEBRASKA USF/VoIP ORDERS**

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska                    ) Application No. NUSF-1  
Public Service Commission, on                    ) Progression Order No. 18  
its own motion, seeking to                    )  
establish guidelines for                         ) OPINION AND FINDINGS  
administration of the Nebraska                   )  
Universal Service Fund.                         )  
  ) Entered: April 17, 2007

BY THE COMMISSION:

On September 26, 2006, the Nebraska Public Service Commission (Commission) entered Progression Order No. 18 seeking input from interested parties regarding the Commission's proposal to adopt a finding that interconnected VoIP service providers provide "telecommunications" and therefore are required to contribute to the state universal service mechanism and whether to require "interconnected VoIP service" providers offering service in Nebraska to contribute to the Nebraska Universal Service Fund (NUSF) based on the Federal Communications Commission's (FCC) safe harbor allocation factor adopted in the Contribution Order.

Interested parties filed testimony or comments in response to Progression Order No. 18 on or before November 17, 2006. Testimony was filed by Qwest Corporation (Qwest), the Rural Independent Companies (RIC), United Telephone Company of the West d/b/a Embarq (Embarq), Level 3 Communications LLC (Level 3), CommPartners Holding Corporation and the Commission Staff. Comments were filed by the Rural Telephone Coalition of Nebraska (RTCN), and Time Warner Cable. A public hearing was held on December 5, 2006. The pre-filed testimony and all comments were received into the record and sworn testimony was presented.

Post-hearing briefs were filed on January 19, 2007 by the RIC, Embarq, Qwest and the RTCN. Reply briefs were filed on February 2, 2007 by the Rural Independent Companies and Embarq.

O P I N I O N       A N D       F I N D I N G S

In this Order we determine that pursuant to *Neb. Rev. Stat.* § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations and definitions found therein. We determine that the term "telecommunications" and "telecommunications service" as defined in Title 291 Neb. Admin. Code, Chapter 10 includes "interconnected Voice over the Internet Protocol" (interconnected VoIP) service providers as the term is used by the FCC. Based on our review of relevant FCC orders and case law, we determine the Commission is not preempted from requiring interconnected VoIP service providers

to contribute to the Commission's state universal service fund. We therefore conclude that interconnected VoIP service providers must contribute equitably to the state-established universal service fund. The Commission further finds that using the reciprocal of the safe harbor percentage set forth in the FCC's *USF Contribution Order* along with alternative contribution options to establish Nebraska intrastate interconnected VoIP service provider revenues subject to the NUSF surcharge does not impose a burden on the federal universal service mechanism. We therefore conclude that interconnected VoIP service providers may choose among three options for separating interstate and intrastate revenues for purposes of assessing the NUSF surcharge which are:

- 1) Use an interim safe harbor allocation of 35.1 percent of VoIP traffic as intrastate;
- 2) Use actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.

We also conclude that the customer's billing address should be used to determine the state with which to associate intrastate revenues of an interconnected VoIP service provider.

#### Background

In 1996 Congress altered the telecommunications landscape by opening the local exchange service market to competition. While promoting competitive markets, Congress also sought to preserve the goal of universal service as defined in 47 U.S.C. § 254. Congress directed the FCC to establish a Federal-State Joint Board to assist in implementing the universal service principles of the Telecommunications Act. These principles, in summary form, include 1) quality services should be available at just, reasonable and affordable rates 2) access to advanced telecommunications and information services should be provided in all regions of the Nation 3) consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; 4) all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service and 5) there should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service. 47 U.S.C. § 254(b).

States are provided the authority to support universal service in the 1996 Telecommunications Act (the Act). Specifically, states are permitted to "adopt regulations not inconsistent with the Commission's [FCC's] rules to preserve and advance universal service."<sup>1</sup> The complete text of 47 U.S.C. § 254(f) provides:

Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the state, to the preservation and advancement of universal service in that state. A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden the universal service support mechanisms.

The Nebraska Telecommunications Universal Service Fund Act (NUSF Act) authorizes the Commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans have comparable accessibility to telecommunications services at affordable prices.<sup>2</sup>

The NUSF Act directs the Commission to require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law.<sup>3</sup> The term "telecommunications company" is defined in the NUSF Act as "any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission."<sup>4</sup>

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<sup>1</sup> 47 U.S.C. § 254(f).

<sup>2</sup> Neb. Rev. Stat. § 86-317 (Cum. Supp. 2004).

<sup>3</sup> Neb. Rev. Stat. § 86-324(2)(d) (Cum. Supp. 2004).

<sup>4</sup> Neb. Rev. Stat. § 86-322 (Cum. Supp. 2004).

Neb. Rev. Stat. § 86-325 authorizes the Commission to adopt and promulgate rules and regulations "as reasonably required" to implement and operate the NUSF. Consistent with this authority, the Commission has adopted rules to implement the NUSF Act.<sup>5</sup> In doing so, the NUSF Rules define various terms including "telecommunications service" and "telecommunications." Telecommunication service is defined in the NUSF Rules as "the offering of telecommunications for a fee."<sup>6</sup> Telecommunications is defined as the "transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received."<sup>7</sup>

The NUSF Rules also provide that the NUSF surcharge shall not be assessed on interstate telecommunications services such as the subscriber line charge.<sup>8</sup> However, in cases where a charge is made to a subscriber which has both intrastate and interstate telecommunications service components, and the interstate service is not charged separately or cannot be readily determined, the NUSF surcharge applies to the total charge, unless such a determination would result in an undue administrative burden, then Commission may establish an allocation factor to determine the intrastate portion of the service or may adopt relevant FCC safe harbor provisions.<sup>9</sup>

By virtue of Neb. Rev. Stat. § 75-118.01, the Commission has the authority to interpret the scope and meaning of its rules and regulations. The Commission has exclusive jurisdiction to interpret the meaning or extent of existing rules and regulations and may do so after notice and hearing.<sup>10</sup>

The Commission has, on a previous occasion with regard to Application NUSF-40/PI-86, interpreted the terms "telecommunications" and "telecommunications service" to apply to facilities-based VoIP service.<sup>11</sup> That decision was appealed by Qwest and ultimately a stipulation was entered into between

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<sup>5</sup> See generally, 291 NAC Chap. 10 (the "NUSF Rules").

<sup>6</sup> 291 NAC § 10.001.01X.

<sup>7</sup> 291 NAC § 10.001.01V.

<sup>8</sup> 291 NAC § 10.002.01D1.

<sup>9</sup> 291 NAC § 10.002.01D1a and 10.002.01D1b.

<sup>10</sup> See *In re Proposed Amendment to Title 291, Chapter 3 of Motor Carrier Rules and Regulations*, 264 Neb. 298, 646 N.W.2d 650 (2002).

<sup>11</sup> In the Matter of the Nebraska Public Service Commission, on its own motion, to determine the extent to which Voice Over Internet Protocol Services should be subject to the Nebraska Universal Service Fund requirements, Application No. NUSF-40/PI-86.

the parties and filed with the Lancaster County District Court.<sup>12</sup> Pursuant to the terms of the Stipulation the Commission was required to open a docket and seek comment on specific questions related to the Commission's definition of facilities-based VoIP providers. The instant docket is the Commission's compliance with the terms of the Stipulation.

Last June, the FCC released the *USF Contribution Order* requiring "interconnected VoIP service" providers to contribute to the federal universal service mechanism.<sup>13</sup> The FCC found that interconnected VoIP service providers furnish telecommunications. Accordingly, the FCC used permissive authority found in 47 U.S.C. § 254 to find that interconnected VoIP service providers should contribute to the federal universal service support mechanism to advance the public interest. Following the issuance of the FCC's *USF Contribution Order*, on September 26, 2006, this Commission initiated the instant proceeding and requested carrier input with regard to a proposal to require interconnected VoIP service providers providing service in Nebraska to contribute to the NUSF based on the FCC's safe harbor allocation factor.

### Discussion

#### *Commission Authority to Determine the Scope and Meaning of Telecommunications and Telecommunications Service*

Level 3 and Qwest assert that the FCC has the exclusive jurisdiction concerning the characterization of interconnected VoIP service and that the Commission is preempted from requiring Nebraska interconnected VoIP service providers to contribute to the NUSF. In its testimony and at the hearing, Level 3 contended the *Vonage Order*<sup>14</sup> preempts state commissions from asserting separate jurisdiction over interconnected VoIP services.<sup>15</sup> Qwest argued in its post-hearing brief that the FCC used the Commerce Clause to preempt the entire field of VoIP.<sup>16</sup> RIC, RTCN, Embarq and, the Commission Staff all disagreed

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<sup>12</sup> *Qwest Corporation v. Nebraska Public Service Commission, et al.*, Case No. CI 05-1721.

<sup>13</sup> *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) (the "*USF Contribution Order*").

<sup>14</sup> *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (FCC rel. Nov. 12, 2004) ("*Vonage Order*").

<sup>15</sup> *Testimony of Greg L. Rogers on Behalf of Level 3 Communications, LLC*, Exhibit No. 3, pg. 3.

<sup>16</sup> *Qwest Corporation's Post-Hearing Brief* (January 22, 2007) at 2 ("*Qwest Brief*").

stating the *Vonage Order* does not support these claims of preemption.

The *Vonage Order* was a declaratory ruling made by the FCC in 2004 regarding Vonage Holding Corporation's VoIP offering called Digital Voice. The Minnesota Commission entered an order requiring Vonage to submit to its traditional certification requirements. The FCC found that with respect to Vonage's Digital Voice service, that the service was jurisdictionally mixed and practically inseparable. Accordingly, the FCC preempted the Minnesota order requiring certification. Some other companies have relied on dicta in the *Vonage Order* which states that the FCC would likely preempt similar VoIP services from traditional state certification requirements. However, we agree with RIC, Embarq, RTCN and the Commission Staff that the *Vonage Order* does not preempt the Commission's authority to require interconnected VoIP service providers from contributing to the NUSF. Rather, the FCC carved out a distinction for E911, universal service, CALEA and other issues by stating:

We do not determine the statutory classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are currently the subject of our IP-Enabled Services Proceeding where the Commission is comprehensively examining numerous types of IP-enabled services, including services like Digital Voice. See generally IP-Enabled Services Proceeding, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as Digital Voice, concerning issues such as the Universal Service Fund, and the extent to which the states have a role in such matters. (emphasis added)<sup>17</sup>

The FCC also stated:

By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and

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<sup>17</sup> *Vonage Order* at footnote 46.

other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry.<sup>18</sup>

Later, in paragraph 44 of the *Vonage Order*, the FCC yet again stated:

[W]e have yet to determine final rules for a variety of issues discussed in the IP-Enabled Services Proceeding. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as Universal Service . . . in that proceeding. (Emphasis added)<sup>19</sup>

Upon consideration of the language in the *Vonage Order*, the Commission disagrees with the interpretation thereof by Level 3 and Qwest regarding preemption. The Commission finds that the FCC has specifically reserved ruling on the issue of universal service and a state's ability to assess state universal service contributions by interconnected VoIP service providers. The clear language in the *Vonage Order* states that such issues may be considered in the FCC's *IP-Enabled Services Proceeding*.

In addition, a recent federal court opinion interpreting the scope of the *Vonage Order* supports the foregoing conclusion by the Commission. In *Comcast IP Phone of Missouri, LLC v. MPSC*, 207 WL 172359 (W.D. MO., Jan. 18, 2007) ("*Comcast*"), the federal court declined to enjoin the Missouri Public Service Commission (MPSC) from proceeding with an action pending against Comcast before the MPSC regarding certification of its VoIP service offering. Comcast requested the federal court to find, as a matter of law that the MPSC is without legal authority to classify as a telecommunications service Comcast's VoIP service. Comcast had further argued that the MPSC could not classify its Digital Voice offering as a telecommunications service unless and until the FCC determined that its Digital Voice is a telecommunications service. The court found the MPSC had the authority to decide whether the VoIP service offered by Comcast was a telecommunications service subject to state regulation. The Court further found that the FCC has not preempted the entire field of VoIP services and that in at least one case, it has determined that a VoIP service was a telecommunications service.

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<sup>18</sup> *Id.*

<sup>19</sup> *Vonage Order* at para. 44, citing footnote 46.



In sum, we find that the *Vonage Order* has not preempted the Commission's ability to classify VoIP service offerings for the purpose of universal service. Further, we find pursuant to the persuasive authority in the *Comcast* decision that the Commission has not been precluded by federal law from determining whether interconnected VoIP service falls within the scope and meaning of "telecommunications" and "telecommunications service" pursuant to this Commission's NUSF Rules.

In the *VoIP 911 Order*,<sup>20</sup> the FCC determined that "interconnected VoIP service" permits users to receive calls from and terminate calls to the public switched telephone network (PSTN).<sup>21</sup> Interconnected VoIP services were defined by the FCC in the *VoIP 911 Order* as "services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN."<sup>22</sup> Thus, providers of interconnected VoIP services must provide access to the PSTN, either by relying on their own facilities or by using others' facilities, and transmission of user information necessarily occurs over such access facilities. The *VoIP 911 Order* requires interconnected VoIP service providers to provide customers with access to 911 services, and to provide a disclaimer of any limitations in their ability to provide 911 service and location information to public safety answering points.

A year later, on June 27, 2006, the FCC released the *USF Contribution Order*<sup>23</sup> which required providers of interconnected VoIP services as defined by the FCC to contribute to the federal universal service fund. In that Order, the FCC concluded that such transmission constitutes the offering of "telecommunications" by interconnected VoIP service providers.<sup>24</sup> The FCC found that interconnected VoIP service providers provide interstate telecommunications and therefore could be subject to the permissive authority in Section 254 of the 1996 Act.<sup>25</sup> To

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<sup>20</sup> *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245(2005) ("VoIP 911 Order").

<sup>21</sup> See *Post-Hearing Brief of the Rural Independent Companies* (January 19, 2007) at 10 ("RIC Brief").

<sup>22</sup> *VoIP 911 Order*, 20 FCC Rcd 10245, 10257-58, ¶ 24 (2005).

<sup>23</sup> *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-11, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) ("USF Contribution Order").

<sup>24</sup> See RIC brief at 10.

<sup>25</sup> Time Warner argues in its comments that the Commission has not identified any ancillary jurisdiction that would authorize it to require interconnected VoIP service providers to contribute to the NUSF. See Comments of Time Warner

make the finding that interconnected VoIP service is interstate telecommunications, the FCC found interconnected VoIP services were jurisdictionally mixed, and because it was difficult to determine the origin and termination points of voice calls, decided that the service was, for practical purposes, inseparable. In the *USF Contribution Order*, the FCC remained silent on states' ability to assess a universal service surcharge on the intrastate portion of revenues derived from interconnected VoIP service. However, the FCC established a safe harbor provision, similar to its approach on wireless traffic, in order to allocate a percentage of calls to the interstate jurisdiction.<sup>26</sup>

Upon review of the *USF Contribution Order*, the Commission agrees with the argument provided by RIC that by expressly comparing the choice of a safe harbor or traffic measurement for use by interconnected voice service providers which is similar to the choice available to commercial mobile radio service (CMRS) providers, the Commission could reasonably assume that the FCC anticipated and tacitly approved assessment of the NUSF surcharge on the Nebraska intrastate portion of interconnected VoIP service provider revenues.<sup>27</sup> CMRS providers are similarly considered to provide interstate telecommunications, and have been and continue to be properly subject to state universal service surcharge assessment.

We further find there is nothing in the NUSF Act that limits the Commission's ability to determine whether interconnected VoIP service providers provide telecommunications or telecommunications services. The Nebraska Constitution grants general power to the Commission to regulate telecommunications except where limited by specific legislation.<sup>28</sup> Further, the Commission finds that interconnected VoIP service falls within the Legislature's statutory delegation of authority to the Commission. Recently, in *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006) the Nebraska Supreme Court, approving the delegation of authority to the Commission, found:

Regulation of the telecommunications industry  
is a complex field as to which the PSC has

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at 11. However, the Commission agrees with Embarq that it need not rely on any ancillary jurisdiction. The Commission needs only to look to Nebraska law for authority as long as there is no conflicting federal law. *Post-Hearing Brief of United Telephone Company of the West d/b/a Embarq* (January 19, 2007) at 4 ("Embarq Brief").

<sup>26</sup> See *USF Contribution Order*, paras. 52-57.

<sup>27</sup> RIC brief at 8.

<sup>28</sup> *Neb. Const. Art. IV, § 20.*

special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality.

272 Neb. 369-70. The Court further stated that,

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely the regulation of communications rates and services. It authorizes the PSC to establish a new means of achieving a long-standing goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund.

272 Neb. 366. Accordingly, the Commission concludes that it has the authority to regulate communications services including the authority to classify and define "Nebraska interconnected VoIP service" provider.

*Classification of Interconnected VoIP service Providers and the Requirement to Contribute to the NUSF*

The RIC, RTCN, Embarq and the Commission Staff supported a proposed finding that Nebraska interconnected VoIP service providers are telecommunications companies offering telecommunications services in the State of Nebraska. Embarq, RIC and RTCN argued that the interconnected VoIP service providers are required by law to contribute to the NUSF.

The terms "interconnected VoIP services" and "interconnected VoIP service providers" were recently developed by the FCC. The FCC imposed on providers of "interconnected VoIP service" the obligation to provide 911 services and the obligation to contribute to the federal universal service mechanism. The FCC defines "interconnected VoIP services" as "services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN." <sup>29</sup> In creating this term, the FCC developed a subset of IP-Enabled service providers and placed

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<sup>29</sup> 47 C.F.R. § 9.3.

certain requirements upon this subset as appropriate to further public interest.

We find, consistent with the federal definition, that the classification "interconnected VoIP service" provider should be used to determine whether such providers provide "telecommunications" in Nebraska and whether such providers offer "telecommunications service." The Commission interprets the terms "telecommunications" and "telecommunications service" pursuant to the authority to define the scope and meaning of the NUSF Rules as they pertain to carriers.<sup>30</sup>

In Neb. Admin. Code, Title 291, Chapter 10, section 001.01V, the NUSF Rules define "telecommunications" as "the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received." The FCC found that interconnected VoIP service providers provide the transmission, between or among points specified by the user, of information of the user's choosing, without a change in the form or content of the information sent and received.<sup>31</sup> Similarly, based on the comments and testimony filed in this proceeding, we find that the Commission's definition of telecommunications would encompass interconnected VoIP service providers despite the use of the term "subscriber" versus the term "user" in the Commission's definition. The Commission finds that for the purposes of defining the term "telecommunications" the term subscriber should have the same meaning and effect as the term user. We also agree with the commenters that interconnected VoIP service providers by definition provide the "transmission" to permit users or subscribers of this service to receive calls from and terminate calls to the public switched telephone network. Further, we find that such providers provide the information of the subscriber's choosing without a change in the form or content of the information as sent or received. No party offered any evidence which would dispute the finding that Interconnected VoIP service providers provide "telecommunications" as defined by the federal Act or by the NUSF Rules.<sup>32</sup>

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<sup>30</sup> See Neb. Rev. Stat. § 75-118.01.

<sup>31</sup> *USF Contribution Order*, ¶ 39.

<sup>32</sup> As stated *supra*, Qwest claimed in its post-hearing brief that the FCC declared interconnected VoIP service as an information service. However, we reject that argument. Should the FCC later decide in its generic *IP-Enabled Services* docket that interconnected VoIP providers are information service providers, the Commission will open a proceeding to revisit this decision.

In section 001.01W, the NUSF Rules define "telecommunications service" as "[t]he offering of telecommunications for a fee." The federal Act defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>33</sup> The federal Act's definition focuses on the end user while the NUSF Rules make no distinction as to the user of telecommunications. The FCC in its *USF Contribution Order* draws a distinction between the terms "offer" and "provide" for the purposes of establishing permissive authority over interconnected VoIP service providers.<sup>34</sup> As a result, the FCC finds that interconnected VoIP service providers provide telecommunications but that they do not necessarily provide "telecommunications service." This Commission has not had the occasion to determine whether "offering" or "providing" telecommunications is meaningfully different in the context of NUSF Rule 10.001.01X. Based on the comments and testimony received, we find that there is no such difference. Although the FCC declares that the term "provide" is more inclusive than the term "offer" the Commission finds that its rule defining "telecommunications service" includes the telecommunications transmission service provided by interconnected VoIP service providers.<sup>35</sup> We find such providers to be offering telecommunications for a fee within the scope of NUSF Rule 10.001.01X.

As we conclude for the purpose of the definition in NUSF Rule 10.001.01X that interconnected VoIP service providers offer telecommunications for a fee, we further conclude that interconnected VoIP service providers are "telecommunications companies." Interconnected VoIP service providers offer a service for a fee that includes the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing without a change in the form or content of the information as sent or received. Thus, Nebraska interconnected VoIP service providers offer "telecommunications service" as that term is defined in the NUSF Rules. The term "telecommunications company" is defined in NUSF Rule 10.001.01W as "any natural person, firm, partnership, limited liability company, corporation, or association entity offering telecommunications service for hire in Nebraska intrastate

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<sup>33</sup> 47 U.S.C. § 153 (46).

<sup>34</sup> The FCC also declares that they have used the terms synonymously. See *USF Contribution Order* ¶ 40, n. 139.

<sup>35</sup> We note that the American Heritage Dictionary defines the term "offer" to mean "to provide or furnish." Several variations of the term "offer" and "offering" include terms synonymous with "provide" and "providing."

commerce without regard to whether such company holds a certificate or permit from the Commission." Based on this definition, we conclude that interconnected VoIP service providers are telecommunications companies as the term is defined in NUSF Rule 10.001.01W. The definition of "telecommunications company" in the NUSF Rules, mirrors the definition found in the NUSF Act. The NUSF Act requires the Commission to require all telecommunications companies to contribute to the mechanism created by the Commission. As such, we find interconnected VoIP service providers must contribute to the NUSF in a manner consistent with other telecommunications companies in this state.

#### *Contribution and Allocation Methodologies*

The Commission finds that interconnected VoIP service providers should be permitted to choose among three options for separating interstate/international telecommunications revenues from Nebraska intrastate telecommunications revenues. We adopt the following three options:

- 1) Use the interim safe harbor allocation factor set forth in the FCC's USF Contribution Order, the intrastate portion of such allocation factor being 35.1 percent intrastate;
- 2) Use the actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.

Interconnected VoIP service providers can elect the same options provided by the FCC in the USF Contribution Order. Nebraska Interconnected VoIP service providers, however, should use the same option for purposes of reporting to the Commission as they have chosen for purposes of reporting to the FCC on Forms 499-A and 499-Q for the same reporting period.

Pursuant to Universal Service rules, the NUSF surcharge shall not be assessed on wholesale services. More specifically, "[t]he NUSF surcharge shall not be assessed on intermediate telecommunications services, such as access service, that are provided by one telecommunications company to another as long as the company receiving such service collects the NUSF surcharge from the retail services that it provides to its subscribers through the use of the intermediate service."<sup>36</sup>

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<sup>36</sup> Neb. Admin. Code, Title 291, Ch. 10 § 2.01D3.

Qwest argues in its post-hearing brief that state commissions must have some methodology for determining the state to which interconnected VoIP service belongs.<sup>37</sup> Qwest states in its brief that wireless service is considered an interstate service and as such the federal and state sourcing acts needed to properly coordinate the assessment of surcharges on wireless services. The state Telecommunications Mobile Sourcing Act (TMSA) was passed long after the Commission began assessing the NUSF surcharge on wireless telecommunications services. The Commission disagrees with Qwest that such an act must exist for the Commission to begin assessing interconnected VoIP service for state universal service purposes. The Commission has long used billing address as an appropriate means for determining the relevant jurisdictional allocation. This approach pre-dated the TMSA and the "primary place of use" definition in *Neb. Rev. Stat. § 77-2703.04* (2003) which essentially relies on the billing address of the customer as a default. The Commission finds the customer's billing address should be used to determine which state with which to associate telecommunications revenues of an interconnected VoIP service provider.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the findings and conclusions made herein are adopted.

IT IS FURTHER ORDERED that interconnected Voice over the Internet Protocol service providers begin billing, collecting and remitting the NUSF surcharge as provided herein commencing July 1, 2007.

MADE AND ENTERED at Lincoln, Nebraska this 17th day of April, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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<sup>37</sup> Qwest Brief at 3-4.

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the ) Application No. NUSF-40/PI-86  
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Commission, on its own )  
motion, to determine the )  
extent to which Voice Over ) FINDINGS AND CONCLUSIONS  
Internet Protocol Services )  
should be subject to the )  
Nebraska Universal Service )  
Fund requirements. ) Entered: March 22, 2005

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BY THE COMMISSION:

B A C K G R O U N D

1. The Nebraska Public Service Commission ("Commission"), on its own motion, opened the above-captioned investigation to determine the extent to which Voice over Internet Protocol ("VoIP") services should be subject to Nebraska Universal Service Fund ("NUSF") contribution requirements. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 24, 2004.

2. The initial order opening this docket was entered by the Commission on August 24, 2004. In that order, the Commission requested that interested persons submit written comments on or before September 30, 2004. Written comments were filed by: AT&T Communications of the Midwest, Inc. ("AT&T"); Cox Nebraska Telcom, L.L.C. ("Cox"); Nebraska Telecommunications Business Users Coalition, Inc. (the "Business Coalition"); The Nebraska Independent Companies for Embedded-Based Cost Support ("NICE-BCS")<sup>1</sup>; The Nebraska Rural Independent Companies ("RIC")<sup>2</sup>; Qwest Corporation ("Qwest"); and Vonage Holdings Corp. ("Vonage").

3. The Commission held a hearing on this matter on December 8, 2004, after due notice to all interested parties. Mr. Tom Bullock testified on behalf of RIC; Mr. Timothy J. Goodwin testified on behalf of Qwest; and Mr. Jeffrey L. Pursley testified on behalf of the Commission Staff.

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<sup>1</sup> The NICE-BCS Group is comprised of: Arapahoe Telephone Company, Benkelman Telephone Co., Inc., Cozad Telephone Company, Curtis Telephone Company, Diller Telephone Company, Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hooper Telephone Company d/b/a WestTel Systems, Keystone-Arthur Telephone Company, Mainstay Communications, Plainview Telephone Company and Wauneta Telephone Company.

<sup>2</sup> The Rural Independent Companies in this context are comprised of: Arlington Telephone Company, Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco Inc., Consolidated Telcom, Inc., Eastern Nebraska Telephone Company, Elsie Telecommunications, Inc., Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hemingford Cooperative Telephone Company, Hershey Cooperative Telephone Company, K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Southeast Nebraska Telephone Company, Stanton Telecom, Inc., and Three River Telco.

E V I D E N C E

4. The Commission's August 24, 2004 Order invited interested persons to respond to the following questions:

1: Can the NUSF surcharge only be assessed on telecommunication services?

2: Can the NUSF surcharge be assessed on information services?

3. If the NUSF surcharge can only be assessed on telecommunication services, does VoIP service contain a portion or portions that is a telecommunication service subject to the NUSF surcharge?

a. If so, what portions of which services?

b. Who is or would be the provider of these services?

c. Who should be required to bill, collect, and remit the NUSF surcharge?

4: Can NUSF only be assessed on intrastate services?

5: If the answer to question 4 is yes, is a portion of the services used to provide VoIP an intrastate service? If so, what portions or services?

6: Is VoIP subject to Neb. Rev. Stat. §§ 86-316 through 86-329 either generally or in part; and if in part, which statutory section(s) applies?

7: In the event VoIP services are provided by an NETC in an area that receives support, should those services, in some manner, be eligible as supported services?

The Commission also invited interested persons to comment on any other issue germane to this proceeding. At the hearing, the comments submitted by the persons identified in paragraph 2 above, were marked as Exhibit 3 and were offered and received into evidence. The positions of the parties as expressed in the Comments and in testimony at the hearing are summarized below.

**AT&T Comments:**

5. AT&T's position is that the NUSF surcharge may only be assessed on telecommunications service offered by a "telecommunications company" as such term is defined in Neb. Rev. Stat. § 86-322 (2002 Cum. Supp.). AT&T further argues that the NUSF surcharge cannot properly be assessed on information services because the Nebraska Legislature did not expressly provide for such assessment in the Nebraska Telecommunications

Universal Service Fund Act Neb. Rev. Stat. §§ 86-316 et seq. (the "NUSF Act").

6. AT&T contends that VoIP does not include a component that is telecommunications service. However, AT&T does recognize that information services utilize telecommunications. AT&T further argues that information service may not be segmented or separated and defined as telecommunications service. AT&T asserts that no portion of a service utilizing VoIP may be categorized as intrastate, that the NUSF surcharge may only be assessed on intrastate service, and thus, the NUSF surcharge cannot be applied to VoIP. In summary, AT&T urges a "hands-off" approach to regulation of VoIP, including no imposition of the NUSF surcharge on VoIP services.

**Cox Comments:**

7. Cox takes the position in its comments that the Legislature's policy statements in Neb. Rev. Stat. § 86-323 lead to the conclusion that the NUSF surcharge may only be imposed on telecommunications service, and not on information services. Cox further refers to § 86-324(2)(d) to support this conclusion.

8. With regard to the issue as to whether the NUSF surcharge may be imposed on any portion of VoIP service, Cox urges deference to the Federal Communications Commission ("FCC") in its Docket No. WC-04-36. Further, Cox states that the NUSF surcharge may only be assessed on intrastate services based upon consideration of applicable provisions of state and federal laws.

**Business Coalition Comments:**

9. The Business Coalition also offered the opinion in its comments that under the NUSF Act, the NUSF surcharge may only be applied to telecommunications service and not to information services. The Business Coalition takes the position that VoIP services do not constitute telecommunications services. Similar to AT&T's position, the Business Coalition maintains that the NUSF surcharge may not be assessed on any portion of VoIP service. The Business Coalition urges the Commission not to impose the NUSF surcharge on interstate telecommunications service.

**NICE-BCS Comments:**

10. NICE-BCS takes the position that VoIP services are telecommunications services for the purpose of assessment of the NUSF surcharge. NICE-BCS maintains that Section 253(b) of the Telecommunications Act of 1996 (the 1996 Act) preserves the right of states to impose requirements to preserve and advance universal service. NICE-BCS directs the Commission to Section 254(f) of the Act which provides that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in the State." In light of this authority, NICE-BCS states that the issue as to whether the NUSF surcharge can only be assessed on telecommunications service is a state law question governed by the terms of the NUSF Act. Accordingly, no provision of the NUSF Act limits the assessment of the NUSF surcharge to telecommunications service, rather the NUSF Act delegates the authority to the Commission to determine those services that should be assessed the NUSF surcharge.

11. In regard to the assessment of the NUSF surcharge on information services, NICE-BCS takes the position that the Commission has the authority to determine which services will be assessed the NUSF surcharge, subject to the requirement that such determination cannot be inconsistent with FCC Rules. NICE-BCS states that it is unaware of any FCC Rule that prohibits a state universal service surcharge assessment on information services.

12. NICE-BCS describes VoIP as the delivery of voice services using Internet Protocol ("IP") for one or more segments of the transmission of a call. Several types and combinations of facilities can be used to provide VoIP services. However, the common denominator of all such services, according to NICE-BCS, is that at some point in the transmission of a call IP technology is used. Further, NICE-BCS' position is that the transmission of a call using IP technology does not change the form or content of the voice information of the call. Relying on the definition of "telecommunications" in Neb. Rev. Stat. § 86-117, NICE-BCS concludes that VoIP services are telecommunications service, and telecommunications service is subject to assessment of the NUSF surcharge.

**Qwest Comments:**

13. Qwest, in its comments, defines VoIP as an IP-enabled service that originates in IP over a broadband facility, requires unique consumer premises equipment and terminates in either IP or Time Division Multiplexing ("TDM"). Qwest asserts that based on such definition, VoIP is an interstate, information service and not a telecommunications service. Unless and until the FCC classifies VoIP as a telecommunications service, Qwest states that VoIP is not subject to state regulatory jurisdiction and may not be subject to state USF assessments.

14. While Qwest states in its comments that the NUSF surcharge may be assessed only on telecommunications service and not on information services, based on the positions outlined in the preceding paragraph, Qwest takes the position that VoIP does not contain a telecommunications service element subject to the NUSF surcharge. This position is based primarily on Qwest's conclusion that all IP-enabled services are properly classified as information services under the Act. Qwest also states that IP-voice applications cannot be viewed in isolation from other IP-enabled services that are a part of the overall IP package marketed to and used by the customer. Therefore, IP-voice is properly viewed as information service. As such, VoIP may not be subject to the NUSF surcharge.

15. Qwest's comments further state that the NUSF surcharge may only be assessed on intrastate services. Qwest primarily relies on the Fifth Circuit's opinion in *AT&T Corp. v. Public Utility Commission of Texas*, 373 F.3d 641 (5<sup>th</sup> Cir. 2004) to support this position. Qwest suggests that any attempt by this Commission to assess the NUSF surcharge on interstate telecommunications service would unfairly burden providers of multi-jurisdictional telecommunications service, and would likely be reversed on judicial review.

#### **RIC Comments:**

16. The RIC comments contain a review of prior Commission proceedings in which the assessment of the NUSF surcharge on IP-enabled services was analyzed. In Application No. C-1628, the Commission specifically sought comment on the question as to whether service providers using IP should contribute to the support of universal service and whether the Commission has authority to require such contribution. All commenters except for MCI, including AT&T and Qwest's predecessor, U S West, in some manner supported the assessment of the NUSF surcharge on IP-enabled services. In its January 13, 1999 Findings and

Conclusions in Application No. C-1628, the Commission concluded "The surcharge will be assessed on all interstate and intrastate telecommunication services regardless of the underlying technology used in the provisioning of these services."<sup>3</sup>

17. The RIC comments also contain a review of FCC decisions and pending dockets relating to VoIP, including the *Pulver Decision* and the *AT&T Decision*.<sup>4</sup> Reference is also made to the *IP-Enabled Services NPRM* that is pending before the FCC.<sup>5</sup> The RIC comments also provided a brief review of relevant judicial decisions, most notably *FCC v. Brand X Internet Services*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003), on which *certiorari* was granted by the United States Supreme Court subsequent to the filing of the comments in this matter.<sup>6</sup>

18. RIC takes the position that every VoIP service requires and involves the provision of telecommunications service to end users because the essential characteristic behavior of all VoIP services is that information of the users' choosing is being transmitted between or among points specified by the user without change in the form or content of the information as sent and received. RIC's further position is that not only can a portion of VoIP service be identified as intrastate in nature, but further the Act requires such classification of VoIP communications between end points within a state. Opinions as to those portions of the VoIP service offerings by Pulver, AT&T, Qwest, Time Warner and Vonage that involve intrastate telecommunications service were provided by

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<sup>3</sup> By Order entered in Application C-1628 on February 2, 1999, the Commission held that the NUSF surcharge should be assessed only on retail intrastate telecommunications service revenues and not on interstate revenues.

<sup>4</sup> In the *Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("*Pulver Decision*"), in which the FCC determined that the Free World Dialup service offered by Pulver is an interstate information service. In the *Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. April 4, 2004) ("*AT&T Decision*"), in which the FCC determined that AT&T's VoIP service is little more than a substitute for its traditional IXC services and should not be exempt from access charges.

<sup>5</sup> *IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("*IP-Enabled Services NPRM*").

<sup>6</sup> *FCC v. Brand X Internet Services*, 125 S.Ct. 655 (Dec. 3, 2004).

RIC. Similar to the position taken by the NICE-BCS group in its comments, RIC contends that the Commission has the authority to assess the NUSF surcharge to the extent that a carrier provides intrastate telecommunications services within Nebraska.

**Vonage Comments:**

19. Vonage, in its comments, urges the Commission to await the FCC's decision of the *Vonage Petition*<sup>7</sup> as well as issuance of the FCC's Order in connection with the *IP-Enabled Services NPRM*. Vonage's position is that its VoIP service is an information service, and that its service is available only to customers who have broadband Internet connections, such as cable modem or DSL service. Vonage states that it offers no transmission services itself. Further, as a consequence of the definitions of "telecommunications service" and "telecommunications" in the Nebraska statutes, Vonage contends that it is not a telecommunications company providing telecommunications service, and therefore is not subject to assessment of the NUSF surcharge.

20. As to whether a portion of the VoIP services provided by Vonage constitutes intrastate service, Vonage states that the Internet has no system for determining the geographic location of users of jurisdiction of calls. Further, Vonage states that its VoIP service is not able to accurately separate all Nebraska-originated or terminated calls from non-Nebraska related call. Thus, Vonage concludes that its service is interstate information service and is not subject to assessment of the NUSF surcharge.

**Testimony by RIC Witness, Tom Bullock:**

21. Mr. Bullock testified that RIC's general position is that portions of VoIP are properly classified as intrastate telecommunications service and are subject to assessment of the NUSF surcharge. Mr. Bullock's testimony focused on four threshold questions: (1) Is VoIP service a telecommunications service or is it an information service? (2) Should a portion of VoIP service be classified as intrastate? (3) Which entities involved in the delivery of VoIP traffic are actually providing

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<sup>7</sup> *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Petition for Declaratory Ruling*, WC Docket No. 03-211 (filed Sept. 22, 2003) (the "*Vonage Petition*"). Subsequent to the filing of the Comments, the FCC released its *Memorandum Opinion and Order* in response to the *Vonage Petition* on November 12, 2004.

a telecommunications service? and (4) What is the Commission's authority to assess the NUSF surcharge on VoIP services?

22. In his analysis of the first issue, Mr. Bullock pointed out that it is important to consider three types of networks. Enhanced services networks were prevalent before the ascendancy of the Internet and were built for the purpose of allowing users to connect to a central computer so that the information residing on such computer could be accessed. The Internet is the second network type and consists of hundreds of separately owned and operated, but interconnected networks that use Internet Protocol and a uniform addressing scheme. The third network type is a network that uses Internet Protocol but is not part of the Internet, with facilities-based networks operated by VoIP service providers generally falling into this category. Mr. Bullock testified that the enhanced services networks with their central computers formed the basis of the FCC's *Computer Inquiry* dockets<sup>8</sup> that established that certain "enhanced" services utilized "basic" telecommunications service to create a total service package delivered to the end user in which basic service was inseparable from enhanced service. Mr. Bullock noted that the AT&T and Vonage comments contend that this "inseparability" concept should apply to the delivery of voice information over an IP network. However, Mr. Bullock asserted that the foregoing position is misconceived because in an IP network, the proposition that the information sent over the network by an application should be inseparable from the network transport contradicts the end-to-end principle that is the essence of the Internet Protocol. The Ninth Circuit, in the *Brand X* decision rejected the inseparability concept with regard to cable modem service.

23. Mr. Bullock also contended that the existence of protocol conversion in the operation of IP networks does not trigger the treatment of the services provided on such networks as information services. In the context of voice service and the definition of "telecommunications" under the Act and Nebraska law, Mr. Bullock asserted that the information of the user's choosing that is being sent and received is the sound as spoken by one party and as heard by the other party as opposed to whether IP packets or TDM format are used in the voice transmission. As such, he concluded that VoIP service should be

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<sup>8</sup>See *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 9, 2004) ("*Vonage Decision*"), footnote 77, for a review of the *Computer Inquiry* dockets and the FCC's holdings therein.



properly classified as telecommunications service and not as information service.

24. With regard to the jurisdictional nature of VoIP service, Mr. Bullock testified that the ultimate end points of a call should be controlling. He disputed claims that it is difficult, or impossible to determine the location of the end-points of a VoIP call, particularly with regard to facilities-based networks operated by VoIP service providers. Mr. Bullock did not argue for recording every VoIP call as interstate or intrastate, but rather stated that a periodic sampling should occur to establish reasonable proportional jurisdictional estimates. As an interim measure, Mr. Bullock urged the adoption of the Safe Harbor jurisdictional split established by the FCC for CMRS traffic - 28.5% interstate and 71.5% intrastate.

25. Because multiple entities are often involved in the provision of VoIP service, Mr. Bullock discussed the importance of identifying the entity that is the provider of telecommunications service. The guiding principle, according to Mr. Bullock, is to identify the entity that is offering transmission of user information to the public for a fee. Facilities-based VoIP providers such as Qwest and Time Warner are providing such transmission and thus, should be classified as telecommunications service providers, according to Mr. Bullock.

26. The fourth issue that Mr. Bullock testified to relates to the Commission's authority to assess NUSF surcharge on VoIP service. Section 254(f) of the Act preserves this authority according to Mr. Bullock and none of the FCC's VoIP-related orders entered to date preempt the Commission from continuing to execute its statutory mandate to preserve and advance universal service in Nebraska. The issue of universal service support and VoIP services has been reserved for discussion in the FCC's *IP-Enabled Services NPRM*. Mr. Bullock referenced the recent passage of Section 1107 of the Internet Tax Nondiscrimination Act, which explicitly preserves the authority of state regulators to impose universal service surcharges on telecommunications services.

27. In summary, Mr. Bullock's testimony supported the propositions that the transmission component of any VoIP service constitutes a telecommunications service, and that the Nebraska intrastate percentage of such transmission component is properly subject to assessment of the NUSF surcharge.

**Testimony of Qwest Witness, Timothy J. Goodwin:**

28. Mr. Goodwin explained that the type of VoIP service for which U S West, Qwest's predecessor, supported assessment of the NUSF surcharge, resembles the current AT&T model that involves the public switched telephone network at both ends of the call and IP routing and switching in the middle. He stated that this type of VoIP service would be properly subject to assessment of the NUSF surcharge. However, he disputed that the VoIP services currently offered by Qwest, Vonage and Time Warner are properly subject to such assessment.

29. Further, Mr. Goodwin described problems with the Commission's assessment of the NUSF surcharge on VoIP services. First, he stated that the Commission lacks jurisdiction to require a VoIP provider to obtain state certification based on the FCC's ruling on the *Vonage Petition*, and therefore lacks authority to enforce an order that a VoIP provider should collect and remit NUSF surcharges. Mr. Goodwin also contended that imposition of the NUSF surcharge on interstate service would burden the interstate universal service fund contrary to the holding in *AT&T Corp. v. Public Utility Commission of Texas*, *supra*. Mr. Goodwin also disputed the appropriateness of using an allocation proxy for VoIP providers such as the FCC has approved in connection with the imposition of state universal service assessments on CMRS traffic.

**Testimony of Commission Staff Witness, Mr. Jeffrey L. Pursley:**

30. Mr. Pursley clarified that the focus of this proceeding is on whether assessment of the NUSF surcharge on VoIP service is proper. Mr. Pursley observed that preservation of universal service is a joint effort between the FCC and state commissions, and this is the intent of the Act. He stated that there is a telecommunications component in VoIP service, that routers and switches cannot exist in a vacuum, and as such there should be contribution to the support of universal service by VoIP service based on this telecommunications component.

31. Mr. Pursley took exception to the four-part test that the FCC has developed in connection with its analysis as to whether a particular service is telecommunications service or information service.<sup>9</sup> He stated, the elements of this test are not a part of the statutory definitions of telecommunications

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<sup>9</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) ("Report to Congress").

service and information service found in 47 U.S.C. § 153(20) and (46), respectively. Mr. Pursley particularly disagreed with the FCC's position that classification of service is determined based upon conversion of user content due to the technology utilized by a service provider, i.e. user information that may enter a network in TDM circuit switched digital format and exit at a packet switched level. Rather, he maintained that if a voice message is sent by a user and is received by the called party as a voice message, there has not been a "change in the form or content of the information as sent and received" and such a call is therefore within the definition of "telecommunications" as found in 47 U.S.C. § 153(43).

32. Mr. Pursley further stated that the routing of calls carried over IP networks outside of the state of origin and even internationally does not determine the jurisdiction of the call. If the call originates and terminates in the same state, it is intrastate and not interstate, and Mr. Pursley referenced previous instances in which the FCC has found that simply routing traffic across jurisdictional boundaries does not change the fundamental jurisdictional nature of the traffic. Mr. Pursley acknowledged that calls carried over IP networks are jurisdictionally mixed and he therefore supported the application of a percentage factor similar to the factor developed by the FCC for application of state universal service surcharges to CMRS traffic.<sup>10</sup>

33. Even with the deployment of IP technology, Mr. Pursley stated he envisioned little if any change in universal service considerations as users in high cost, sparsely populated areas will continue to require connections to a service provider's network, and the costs associated therewith will require support in order to maintain universal service. Mr. Pursley stated that since VoIP providers use telecommunications service and because VoIP providers can and do connect their service to users in rural and high-cost areas, it is proper, as a policy matter, for users of VoIP services to support universal service. Further, he stated, state and federal law requires service comparability in urban and rural areas as well as comparability for low-income persons. Universal service support is required to maintain such comparability. In Mr. Pursley's view, if users of VoIP services are not required to contribute to the support of universal service, the funding base for universal service will shrink to a point that services in high-cost and rural areas will have to be

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<sup>10</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002).

priced at actual cost, violating rate comparability requirements of state and Federal law and violating the universal telecommunications service policy that has existed in this country since the passage of the Communications Act of 1934.

34. Mr. Pursley emphasized that this proceeding does not concern issues of market entry certification or service quality regulation. Rather, it is for the purpose of determining those services directly or indirectly related to the provision of VoIP services that should contribute to the NUSF. If an entity is a provider of telecommunications, in Mr. Pursley's view, that entity should have a universal service support obligation. The provision of such support should be competitively neutral, should be sustainable and should not be for the purpose of generating additional NUSF funds.

#### OP I N I O N     A N D     F I N D I N G S

##### **A.     State Regulatory Authority Regarding Universal Service**

35. Section 254(f) of the Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in the State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."

36. The authority of the states with regard to universal service is also supported by the terms of Section 253(b) of the Act that provides, in pertinent part: "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service . . ." The FCC may preempt state actions to preserve and advance universal service only in accordance with Section 253(d) of the Act which provides: "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the

Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

37. Further, on December 3, 2004, the President signed into law the "Internet Tax Nondiscrimination Act."<sup>11</sup> Section 1107 of that Act provides: "Nothing in this Act shall prevent the imposition or collection of any fees or charges used to preserve and advance Federal universal service or similar State programs - (1) authorized by section 254 of the Communications Act of 1934 (47 U.S.C. § 254); or (2) in effect on February 8, 1996." (emphasis added) The Commission believes Congress' inclusion of this provision in the Internet Tax Nondiscrimination Act is an important statement of congressional intent that the states are not only permitted to implement universal service support programs, but further that such programs may require contributions to support universal service from services that utilize Internet Protocol as long as the state universal service support program is authorized by Section 254 of the Act.

#### **B. The NUSF Act and Commission Regulations**

38. In 1997, the Nebraska Legislature passed the NUSF Act.<sup>12</sup> The NUSF Act is now codified in Neb. Rev. Stat. §§ 86-316 - 86-329 (2002 Cum. Supp.). The purpose of the NUSF Act "is to authorize the Commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices."<sup>13</sup> The Legislature specifically directed that the Commission, to the extent not prohibited by federal law, "shall require every telecommunications company to contribute to any universal service mechanism established by the Commission pursuant to state law."<sup>14</sup> "Telecommunications company" is defined in the NUSF Act as "any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a

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<sup>11</sup> Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, § 1107, 118 Stat. 2615, 2617 (2004).

<sup>12</sup> 1997 Neb. Laws, LB 686.

<sup>13</sup> Neb. Rev. Stat. § 86-317.

<sup>14</sup> Id., § 86-324(2)(d).

telecommunications contract carrier from the commission."<sup>15</sup> Additionally, the Legislature authorized the Commission to adopt and promulgate rules and regulations as reasonably required to develop, implement and operate the NUSF.<sup>16</sup>

39. In accordance with this legislative authorization, effective September 16, 2002, the Commission implemented Neb. Admin. Code Title 291, Chapter 10 (the "NUSF Rules"). The NUSF Rules provide *inter alia* that the NUSF surcharge shall be assessed on all end-user telecommunications services provided in Nebraska intrastate commerce.<sup>17</sup> "Telecommunications service" is defined as "the offering of telecommunications for a fee."<sup>18</sup> "Telecommunications" is defined as "the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received."<sup>19</sup>

40. The NUSF Rules provide that the NUSF surcharge shall not be assessed on interstate telecommunications services.<sup>20</sup> However, in cases where a charge is made to the subscriber for both intrastate and interstate telecommunications service, and the interstate telecommunications service is not charged separately or cannot be readily determined, the NUSF surcharge is to be applied to the total charge, except in those instances in which the intrastate portion of such joint use service charge cannot be determined, or if such determination would result in an undue administrative burden, the Commission may establish an allocation factor to determine the intrastate portion of the service or may adopt any relevant FCC safe harbor provisions.<sup>21</sup>

### **C. FCC VoIP-Related Decisions and Universal Service Funding**

41. As many of the commenters discussed, the FCC has released three significant orders recently concerning the regulatory treatment of VoIP-related services and VoIP service providers. In the first such order, generally referred to as the "Pulver Decision", the FCC determined that the Free World Dialup service offered by Pulver is an interstate information service.<sup>22</sup> In the second order, generally referred to as the

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<sup>15</sup> *Id.*, § 86-322.

<sup>16</sup> See *id.*, § 86-325.

<sup>17</sup> Neb. Admin. Code Title 291, Chapter 10, § 002.01.

<sup>18</sup> *Id.*, § 001.01X.

<sup>19</sup> *Id.*, § 001.01V.

<sup>20</sup> See *id.*, § 002.01D1.

<sup>21</sup> See *id.*, §§ 002.01D1a and 002.01D1b.

<sup>22</sup> *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,*

"AT&T Decision", the FCC determined that AT&T's VoIP service is little more than a substitute for its traditional interexchange service and should not be exempt from access charges.<sup>23</sup> Most recently, the FCC announced its "Vonage Decision"<sup>24</sup> in which the FCC found Vonage's DigitalVoice VoIP service to be jurisdictionally interstate and preempted the Minnesota PUC's authority to impose entry regulation on Vonage<sup>25</sup>.

42. More importantly, it is relevant for the Commission's purpose in this proceeding to determine what the FCC did not decide in its three VoIP orders. First, in the *Vonage Decision* the FCC did not make a decision with regard to the definitional classification of Vonage's DigitalVoice as either telecommunications or information service under the Act.<sup>26</sup> Second, and specifically with regard to issues regarding universal service funding, in the *Vonage Decision* the FCC expressly stated that "important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, concerning issues such as the Universal Service Fund . . . and the extent to which states have a role in such matters"<sup>27</sup> would be addressed in the "IP-Enabled Services Proceeding". (Emphasis Added). Thus, based on the *Vonage Decision*, it is clear to the Commission that the FCC has not addressed the central issue of this proceeding as identified by Mr. Pursley, namely, whether assessment of the NUSF surcharge on VoIP service is proper.<sup>28</sup>

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WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("*Pulver Decision*").

<sup>23</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. April 4, 2004) ("*AT&T Decision*").

<sup>24</sup> *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 9, 2004) ("*Vonage Decision*").

<sup>25</sup> The Commission confirms Mr. Pursley's testimony (see paragraph 34 *supra*) that this proceeding does not concern issues of market entry certification or service quality regulation for VoIP service providers. Rather, it is for the purpose of determining those VoIP service providers that should contribute to the NUSF.

<sup>26</sup> *Id.* at para. 14.

<sup>27</sup> *Id.* footnote 46, referencing *IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("*IP-Enabled Services Proceeding*").

<sup>28</sup> See para. 30 *supra*.

**D. Assessment of the NUSF Surcharge on Facilities-Based VoIP Service Providers**

43. In order to determine whether VoIP providers are required to contribute to the NUSF, a determination must be made whether such providers are "telecommunications companies" as defined in NUSF Act § 86-322.<sup>29</sup> Such status exists only if the VoIP provider is offering "telecommunications service". In § 86-318, the Legislature provided "the definitions found in sections 86-319 to 86-322 apply." Although "telecommunications service" is not defined in such sections, § 86-321 refers to the 1996 Act, which contains a definition of such term, as does Neb. Admin. Code, Title 291, Chapter 10, § 001.01X.<sup>30</sup> Section 153(46) of the Act defines "telecommunications service" as ". . . the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Section 153(43) of the 1996 Act, in turn, defines "telecommunications" as ". . . the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." This definition of telecommunications is essentially identical to that provided in Neb. Admin. Code, Title 291, Chapter 10, § 001.01V.<sup>31</sup> Thus, the question is whether VoIP providers offer a service to end users for a fee that transmits information of the user's choosing between points specified by the user without change in the form or content of the information as sent and received.

44. As illustrated by the FCC's three VoIP related orders referenced above, there are important differences among the service providers using Internet Protocol in the delivery of voice service to subscribers. For the purposes of this Order, the principal characteristic distinguishing such providers is whether the VoIP provider or an affiliate owns the physical network that transmits the user's voice information. We define the term "facilities-based VoIP providers" as those providers that either own or operate networks that utilize Internet Protocol in the delivery of voice services,<sup>32</sup> but do not share

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<sup>29</sup> See para. 38 *supra*.

<sup>30</sup> See para. 39 *supra*.

<sup>31</sup> The only difference in the definition in Section 153(43) of the 1996 Act and § 001.01V is that the latter uses the word "subscriber" rather than the term "user" in the 1996 Act's definition.

<sup>32</sup> On the basis of the records established in Application Nos. C-3201 and C-3228, facilities-based VoIP providers would include Qwest Communications Corporation and Time Warner Cable Information Services (Nebraska), LLC d/b/a Time Warner Cable, respectively.



addressing space with the public Internet<sup>33</sup> and therefore, are not part of the Internet.<sup>34</sup> . We find facilities-based VoIP providers do transmit information of the user's choosing between points specified by the users.

45. We next examine whether VoIP service effects a change in the form or content of the information as sent and received. It may be suggested that because facilities-based VoIP providers use protocol processing to convert messages from asynchronous IP packets into synchronous TDM format used by the PSTN and vice versa, their VoIP service is an information service<sup>35</sup>, not a telecommunications service, and thus not subject to assessment of the NUSF surcharge. The Commission rejects the notion that protocol conversions that occur in connection with the completion of a voice call carried by a facilities-based VoIP provider constitute a "change in the form or content of the information as sent and received" so as to remove the call from the definition of telecommunications, and thus render the call not to be telecommunications service. We believe that it is more reasonable to regard the information chosen to be transmitted by the user or subscriber to be the information comprised of the words or sounds spoken and intended to be received by the called party, rather than mode of transmission or digital bit stream that facilitates the exchange of such information. We further believe that this conclusion best reflects Congress' and the Legislature's intentions in providing the definitions referenced above to be applied in this context. Based on the comments and testimony in the record, the Commission finds that facilities-based VoIP providers offer telecommunications service for hire in Nebraska intrastate

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<sup>33</sup> Networks that share addressing space are networks in which the addresses of all connected devices remain unique when the networks are interconnected. For example, the Internet, being a collection of interconnected networks, requires that the addresses defined on each constituent network be confined to a space that excludes the address space of all other constituent networks. Networks that do not share addressing space cannot be interconnected without risking address duplication. (For a helpful tutorial on Internet addressing, see [http://www.tcpiipguide.com/free/t\\_IPAddressing.htm](http://www.tcpiipguide.com/free/t_IPAddressing.htm).)

<sup>34</sup> We note that entities such as Vonage provide VoIP services over the public Internet. We make no findings in this Order related to Vonage-like VoIP services. Rather we reserve consideration regarding potential assessment of NUSF surcharge on such services for a future date.

<sup>35</sup> "Information services" are defined in Section 153(20) of the 1996 Act as ". . . the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

commerce, and are therefore telecommunications companies, as defined in § 86-322 that this Commission may require to contribute to the NUSF.

46. We find that services offered by facilities-based VoIP providers may also contain information service components, such as voice mail or web-based message management services. To the extent that such information services are present in facilities-based VoIP providers' service offerings, facilities-based VoIP providers may establish separate prices for the information service and telecommunications service components of a bundled service offering provided that such separated prices are supported by cost information provided to the Commission. Upon Commission approval, facilities-based VoIP providers may use such prices in reporting telecommunications service revenue subject to assessment of the NUSF surcharge. In the absence of Commission approval of such separate pricing and supporting cost data, each facilities-based VoIP provider offering service in Nebraska shall report the entire price of its VoIP service offering as telecommunications service revenue, subject to assessment of the NUSF surcharge.<sup>36</sup>

47. Finally, we make no distinction among facilities-based VoIP providers based on the transmission media utilized to transport users' voice information. Requiring contributions to the NUSF by all facilities-based VoIP providers is consistent with maintaining a competitively neutral environment among all telecommunications companies offering telecommunications service for hire in Nebraska intrastate commerce.

#### **E. Limiting Assessment of NUSF Surcharge to Intrastate Service**

48. As pointed out above, the NUSF Rules and this Commission's decision in Application No. C-1628 establishes that the NUSF surcharge should be assessed only on intrastate telecommunications service.<sup>37</sup> By so limiting assessment of the NUSF surcharge, the Commission believes that it is acting consistently with the principles established by the Fifth Circuit Court of Appeals in *AT&T Corp. v. Public Utility Comm'n of Texas*, 373 F.3d 641 (5<sup>th</sup> Cir. 2004).

49. Consistent with well-established precedent, the ultimate end points of a call determine the jurisdictional

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<sup>36</sup> Such price shall be subject to division between intrastate and interstate revenue as well. See paragraphs 50-52, *infra*.

<sup>37</sup> See paras. 40 and 49 *supra*.

nature of the call.<sup>38</sup> The facilities-based VoIP providers may contend that it is difficult or impossible to determine the location of the end-points of VoIP calls. In the Commission's view, such a determination is comparable to determining the jurisdiction of CMRS calls. The FCC has established a "safe harbor" for CMRS traffic based on a 28.5% interstate and 71.5% intrastate allocation.<sup>39</sup> In response to the Fifth Circuit's decision in *AT&T Corp.*, *supra*, the Texas PUC has established several safe harbor percentages, depending upon the type of carrier, including the CMRS safe harbor adopted by the FCC.<sup>40</sup>

50. The Commission finds the intrastate service portion of total services furnished by facilities-based VoIP providers shall be established based upon: (a) The rebuttable presumption of a safe harbor allocation of 28.5% interstate and 71.5% intrastate; or (b) an allocation based upon a reasonable sampling of a facilities-based VoIP provider's actual call data that will be reviewed by the Commission and if approved, will be accepted if different than the safe harbor percentage; or (c) actual measurement of call data. The Commission further finds that the foregoing methods for establishing interstate-intrastate allocation will avoid imposition of greater burdens on multi-jurisdictional facilities-based VoIP providers as compared to purely interstate or intrastate carriers, will not competitively disadvantage facilities-based VoIP providers, and will result in contributions on an equitable and non-discriminatory basis to the preservation and advancement of universal service in Nebraska that is consistent with the requirements of Section 254 of the 1996 Act.

#### O R D E R

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<sup>38</sup> See GTE Telephone Operators GTOC Tariff No. 1 GTE Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 ¶¶ 17-19 (October 30, 1998), *recon. denied* (February 26, 1999) (*GTE DSL Order*), in turn citing *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619, 1621 (1992) (*BellSouth MemoryCall*)); *Southwestern Bell Telephone Company*, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Telephone Company*); *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); *New York Telephone Company*, 76 FCC 2d 349, 352 (1980).

<sup>39</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24952 (rel. Dec. 13, 2002).

<sup>40</sup> See Order Regarding TUSF Assessment of Intrastate Telecommunications Services Receipts, 2004 WL 1790871 (Tex. P.U.C. July 29, 2004).

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the foregoing Opinion and Findings are hereby adopted in their entirety, and that facilities-based VoIP providers shall contribute to the NUSF, and the NUSF surcharge shall be assessed on the intrastate portion of facilities-based VoIP providers' VoIP-related services in accordance with the foregoing Opinion and Findings commencing effective June 1, 2005.

MADE AND ENTERED in Lincoln, Nebraska on this 22<sup>nd</sup> day of March, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director